

Fair Use & the Artifact Test Tips for Using Entertainment Clips in Docs

By Neil J. Rosini

Fair use is a powerful concept. It gives documentary makers leave to use others' copyrighted films and video with neither permission nor legal consequences. It can mean the difference between being on time and within budget and being months late and unprofitable. In the absence of fair use some documentaries simply would not be made.

Copyright owners usually control how their works are used but fair use cuts a hole in that monopoly. A licensed use pays owners money, and an unauthorized fair use pays them nothing. This rule applies even to copyrighted works that entertain, like a classic sci-fi movie, a sporting event, or a clip of Elvis.

Because documentary producers borrow more than lend, the fair use exception is invaluable — unless they're wary of applying it incorrectly and choose to stay clear of it. Fortunately, the law allows a simplified approach to invoke fair use even when works of entertainment are excerpted. A motion picture that depends on fair use might not resemble another for which clearances are obtained, but fair use can save time and money for those who meet its standards. Here are two instances that show why.

Tyler's project

A producer named Tyler spent the last three months overseeing an ordeal of clip clearances. Tyler's documentary is about the evolving performance styles of Hollywood's leading men from Clark Gable through George Clooney, and it contains clips from 25 films. Although Tyler and three assistants have been working twelve-hour days, an on-time delivery seems unlikely.

They began by identifying the current copyright owner for each clip using Copyright Office records and other sources. Thanks to decades of corporate mergers, bankruptcies and asset sales, this took a while. Once inquiries were made, the copyright owners, mostly studios, implied by their slow responses and overall indifference that granting clip licenses was not the most productive use of their administrative resources. On top of that, the licenses they offered were much more expensive than the budget anticipated, and some clips had to

be dropped.

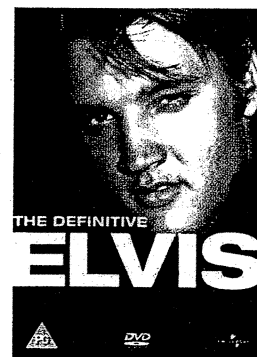
Some studios demanded that Tyler assume liability for a range of costs that extend far beyond the license fee. For example, if SAG or the DGA requires that an actor or director be compensated for the licensed use (however brief), Tyler's production company and not the studio will be on the hook. Some clip sources required that Tyler obtain appearance releases from every actor in the clip before the studio's license would even take effect. As a result, the expense of rights-clearing personnel will be double what was budgeted, and Tyler is not sleeping well.

Lee's project

Another producer, Lee, is just finishing up a documentary retrospective of television's female stars that uses 50 clips of TV performances. To establish that Lucille Ball had a broad physical style, Lee chose several seconds from a relatively unknown skit that demonstrated her physical skills, and not Lucy's funniest work. This was the minimum necessary to support the point. When Lee wanted to show that Carol Burnett relied on wigs for some of her humor, it was done with three clips from three shows, only four seconds each, with voiceover instead of synchronized sound. That was the minimum necessary to make that point visually. From there, newly shot interviews and narration made the point in words. When Lee had to illustrate that rare footage existed of another comedienne in a dramatic role, it took only eight seconds of footage and only five seconds of original audio (the rest of the visual being covered by narration) to supply the historical reference point.

Lee isn't concerned about getting releases from actors depicted in the clips, or dealing with studio indifference, or filling out application forms, or paying huge license fees, or any license fees. Lee is simply skipping the clearance step and, notwithstanding that permissions for the clips were neither requested nor obtained from studios or anyone else, Lee's exhibitor and the errors and omissions carrier that insures the project have raised no objection. Side-stepping the clearance headache, Lee has produced a project on time and within budget that's perfectly legal. Lee applied

fair use and Tyler didn't.



Fair use or not?

The quandary of documentary producers is just that: to take advantage of fair use or not. Follow the safer route and clear the rights, or avoid the hassle and face the risk? The answer to the question depends on the style of documentary intended as well as one's willingness to deal with fair use standards. Applying the rules of fair use *can* seem complicated thanks to a multi-part "balancing test" — that gatekeeping sphinx of the U.S. Copyright Act which declares when fair use applies. But parrying the fair use riddle is simpler than many realize, making it an efficient and valuable tool for documentary producers once the aesthetic effects are taken into account.

Did both Tyler and Lee use their clips the same way? Probably not; Lee's program typically would have shorter clips and a higher proportion of commentary and interviews. Do both films effectively cover the subject matter? There's no reason they couldn't. Did Tyler have a good reason to pass up fair use? Before addressing that, let's survey what fair use is and what it isn't when borrowing entertainment footage for documentaries.

The simplified test

The purpose of copyright is to benefit not just authors but also the whole of society: "to promote the Progress of Science and useful Arts," as Article I, Section 8 of the U. S. Constitution puts it. Toward that end, the copyright monopoly exists for a limited term (currently, the life of the author plus 70 years) to give authors a financial incentive to create. Fair use cuts into that monopoly in a *limited* way during the copyright term.

Copyright law promotes fair use treatment for a variety of purposes including criticism, comment, scholarship, research, teaching, and news reports, which are all singled out in the Copyright Act. But even for those pet categories, the law requires that a balancing test be applied to distinguish a *fair* use from indefensible infringement. The purpose of the four-part test is to determine whether the owner's usual monopoly over control of a

copyrighted work should give way to the ultimate purpose of copyright law and benefit society as a whole. If so, fair use defends the borrower; if not, the borrower is an infringer.

The first part of the test is an appraisal of the purpose and character of the taking, in which commercial uses like advertising are shunned and “transformative” uses win points. “Transformative” borrowings are said to place the borrowed work in a new and original context by adding insights and understanding.

The second factor to be balanced is the nature of the work being borrowed from. Works of the imagination like TV shows and feature films do not lend themselves to fair use as readily as scholarly and fact-based endeavors. This works against borrowings of entertainment footage, but it’s only one factor out of four.

Next comes the amount and substantiality of what’s taken from the borrowed work as compared to the borrowed work as a whole in both quantity and quality. Taking the qualitative “heart” of the original work is discouraged even if quantitatively small.

Last comes an assessment of the effect of the unauthorized taking on the value in the marketplace of the borrowed work. This part of the test asks: what economic value is left for the owner of the borrowed work should the taking in question become widespread?

In case decisions, each factor is usually addressed in turn and either the borrower or the copyright owner is declared the winner of the round, although assessments of “transformativeness” and economic effect are often given greatest weight. The litigant with the most points — either the fair use borrower or the copyright owner — wins the match.

The problem lies in predicting the outcome of close contests where the four factors seem better calibrated to show gray zones than black and white answers. Critics lament the chilling effect exerted by this vagueness over law-abiding producers who choose to forgo the benefits of fair use rather than guess incorrectly and lose a lawsuit. To address this concern, attention has been given in recent years to formulating “best practices” for documentary makers that might come to be recognized as industry norms and encourage more fair use.

The “Documentary Filmmakers’ Statement of Best Practices in Fair Use” (2005),

which is endorsed by a number of media groups, defined four kinds of situations that favor fair use treatment:

1. **employing copyrighted material as the object of social, political, or cultural critique;**
2. **quoting copyrighted works of popular culture to illustrate an argument or point (e.g., clips from fiction films to demonstrate changing attitudes about race);**
3. **capturing copyrighted media content in the process of capturing images of something else (for example, posters on a bedroom wall, or music playing on a kitchen radio); and**
4. **using copyrighted material in a historical sequence (to “represent history to new generations of citizens”).**

The Statement [available at www.cen-terforsocialmedia.org] accompanies each situation with a set of limitations to be borne in mind. The result is simpler than what the Copyright Act offers but not exactly simple.

Another approach is to avoid close calls by identifying and applying a ‘least common denominator’ across the four factors that will give fair-users the strongest position. How simply can that standard be

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stated? For creators of documentaries and news reports taking footage from others, I suggest that a practical rule of fair use can be reduced to this:

If the material for which a fair use defense is sought is limited by the borrower in length and quality to the minimum needed to show the mere existence of the subject matter of the borrowed work, or the mere existence of the borrowed work itself, the use is probably fair, and if not, it probably isn’t.

Call this the Artifact Test. Fair use treatment is most accessible when the borrowed bits from works are employed as ‘artifacts’ to show that the subject matter depicted in them exists, or that the recorded or filmed record exists, and no more. It cuts agnostically across categories of borrowed movies and video, but when the borrowed work is meant to entertain, the Artifact Test needs a corollary:

If borrowing is intended not only to inform but entertain by giving the viewer an opportunity to sit back and enjoy the enter-

taining effect that the borrowed work was intended to produce for its original audience, then no fair use defense is likely.

To pass the Artifact Test, the borrowed work of entertainment has to be used as a mere artifact. Using it to entertain — the same purpose it originally satisfied — isn’t likely to be “fair.”

Applying the Artifact Test

The basis for this slimmed down test lies in several case decisions that demonstrate how a simplified approach can work for the benefit of documentary makers. One of them is a 2003 appellate decision from a federal court in California.

The defendants produced and sold a 16-hour video documentary about Elvis Presley called *The Definitive Elvis*. They were sued by a posse of copyright holders, including Elvis Presley Enterprises and others, with rights in footage of Elvis’ performances that appeared in the documentary without permission. Borrowed clips were used in a variety of ways. In some instances, they were relatively brief and accompanied by audio commentary. In other instances, clips ran for more than a minute without interruption, such as an excerpt that included “the heart” of Elvis’ famous *Hound*

Dog appearance. In the aggregate, the excerpts comprised a “substantial portion” of Elvis’ total appearances on many TV shows in which the plaintiffs

owned the copyrights, including almost all of Elvis’ appearances on *The Steve Allen Show* and about one-third of his appearances on *The Ed Sullivan Show*. The defendants invoked fair use and lost.

The court acknowledged that it would be “impossible to produce a biography of Elvis without showing some of his most famous television appearances for reference purposes,” and that clips from those television shows *could* be used without authorization as “historical reference points in the life of a remarkable entertainer” or to “note their historical value.” (A filmmaker can show that the subject matter existed, e.g., the young smoldering Elvis, or the older, gaudily dressed Elvis, or the existence of a home movie of his performance as a teenager, long thought to be lost).

The court also acknowledged that Elvis’ television appearances were “newsworthy events,” a favored category that tends to support fair use. But in the judges’ view, many of the clips were used in excess of

the "benign purpose" of a biography and simply were included to profit "at least in part from the *inherent entertainment value* of Elvis' appearances." Clips that ran without much interruption offered "the same intrinsic entertainment value" protected by the plaintiffs' copyrights, with the result that their use was not sufficiently "transformative."

The producer flunked another part of the fair use test by failing to copy only "as much as necessary for his or her intended use." Instead, in many instances the documentary included the "heart of the work" — the most valuable parts. And further, with its emphasis on entertainment, the documentary served the same purpose in the marketplace as the plaintiffs' original works. In short, all four parts of the fair use balancing test favored the plaintiffs.

In reaching this result, the court distinguished two other cases that applied the fair use test with opposite results. In one, video footage used in a biography of Muhammed Ali for less than two minutes was a defensible "combination of comment, criticism, scholarship and research" concerning "a figure of legitimate public concern" and protected by fair use. In the other case, a clip from a copyrighted science fiction film used in a biography of the actor Peter Graves was a fair use because it didn't "re-create the creative expression" (that is, the core entertainment value) in the plaintiff's film. Instead, it helped the viewers understand "the actor's modest beginnings in the film business." On top of that, it was accompanied by narration that placed it in context. In both cases, the borrowed clips were nestled in commentary, the documentaries did not take much entertainment value, and relatively little from the originals was copied.

There's also an additional reason to avoid taking entertainment value from works featuring an act, like Elvis's. A performer - in addition to a copyright owner - may have a claim for payment when an entertaining chunk of a recorded performance is copied into a documentary without permission. However, a borrowing of a recorded performance that's a fair use — and low on entertainment value — is also likely to find protection under the First Amendment from the performer's claim. So, if no copyright clearance is required for a brief borrowing of a performance, then no publicity right likely needs to be paid for, either. The documentary maker who dotes on performances may have to clear both.

In addition to the Elvis decision, there is further support for the Artifact Test. For example, in a 2006 case involving an

illustrated history of the rock group The Grateful Dead, a court allowed the fair use defense where the plaintiff's posters were reproduced in miniature in a collage of text and images. The court explained that the posters appeared "as historical *artifacts* to document and represent the actual occurrence," and thereby qualified as fair uses. This appears to be the first case to characterize such uses as "artifacts."

Cleared use is still different

The Artifact Test may make applying the fair use defense easier in the case of borrowed footage, but it's important to remember that a documentary that relies on fair use extensively will differ from another for which footage is cleared by license. For one thing, there is almost always going to be *some* mystery about the outcome of a fair use dispute. Although clearing footage with copyright owners costs time and money, once licenses are obtained, they usually offer bulletproof shields against lawsuits. Even when conservatively applied, fair use is not as certain as a license.

Another drawback of the Artifact Test, and of fair use itself, is that a finished documentary full of fair use clips usually will differ aesthetically from one based on cleared footage. The Artifact Test tells us why: the clips need to be brief, focused on the existence of the footage or its content, and not a collection of "the best of" anything. The resulting documentary will be heavy on comment and analysis and light on borrowed entertainment value. To be entertaining, a doc full of fair use borrowings will have to pull its own weight.

Documentaries that are meant to depict rather than talk about the highlights of an entertainer's career, will not be terribly entertaining if they rely on fair use. This is why Tyler decided to clear all borrowed clips, notwithstanding the travails that choice brought on. Once Tyler chose to present a series of *performances* for the audience to compare and enjoy for their entertainment value, there was little alternative to obtaining licenses from owners of the borrowed clips. While it theoretically may be possible (and not probable) to create that kind of documentary by using clips solely on the basis of fair use, such a venture would be risky and certainly not fit within the scope of the Artifact Test.

In contrast to Tyler's, many documentaries are conceived to serve up critical analysis rather than entertainment. These will profit the most from fair use privileges. Lee's retrospective fit this mold. In each

clip, Lee carefully took no more than the minimum required to show the mere existence of the content in the borrowed work, without inviting the audience to enjoy the performances. Instead, the documentary's value came from the entertainment and information provided by interviews and narration. Was Lee's documentary any less entertaining than Tyler's? Not necessarily, but to the extent there was entertainment, Lee had to create it. Tyler, for the most part, obtained it by license from others.

Although our focus has been the use of clips from works of entertainment, fair use may be applied to all sorts of copyrighted works under the right circumstances, including still photos, music, and graphic works. The rules that apply to those categories, however, vary somewhat from those applicable to film clips and call for separate treatment.

A fair conclusion

The law may not always be as it is today. Copyright activists argue that fair use should be liberalized for society's benefit, commensurate with the boon to copyright owners conferred by extension of copyright's term by 20 years. However, don't count on making another *That's Entertainment* any time soon without clearing the clips.

For now, the Elvis case and others show that documentary producers can rely on fair use if they use clips from entertainment works only as historical reference points — to show that the content of the clips exists or the clips themselves exist — and frame them in a discussion of their context and significance. Moreover, when performances are involved, their effect as "pure entertainment" should be minimized by taking as little as possible to support the point being made, and unless your lawyer tells you otherwise, leave the best bits behind.*

*This article should not be construed as legal advice, which depends on individual facts and circumstances. And bear in mind that the rules may be different for foreign distribution.

Neil J. Rosini (nrosini@fwrv.com) is a partner at the New York law firm of Franklin, Weinrib, Rudell & Vassallo, P.C. (www.fwrv.com). He advises documentary makers and news producers regarding the law of copyright, defamation, publicity and privacy rights. The firm practices in all areas of entertainment including negotiation of financing and distribution agreements, and acts as production counsel for major independent films.